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ABU BAKAR PANGIS & ORS

v.

TUNG CHEONG SAWMILL SDN BHD & ORS

B

HIGH COURT SABAH & SARAWAK, MIRI
STEPHEN CHUNG JC
[SUITS NO: 22-16-2003(MR) & 22-19-2003(MR)]
30 MARCH 2012

C ***NATIVE LAW AND CUSTOM:*** *Land dispute - Native customary rights - Inheritance of land from ancestors through native customary rights - Whether proved - Alienation of land - Whether lawful - Parts of land claimed already issued with timber licences - Whether native customary rights extinguished - Whether claimants entitled to individual*
D *titles of plots of land*

LAND LAW: *Alienation of land - Native customary rights - Inheritance of land from ancestors through native customary rights - Parts of land claimed already issued with timber licences - Whether native customary*
E *rights extinguished - Whether alienation lawful - Whether claimants entitled to individual titles of plots of land - Whether alienation of land constitutional under art. 5 Federal Constitution - Sarawak Land Code, s. 18*

F The plaintiffs, on behalf of themselves and 150 others, claimed that they were the occupiers, owners and/or claimants of native customary rights ('NCR') over individual plots of land owned by them in Sarawak. In support of their allegations, the plaintiffs relied on two maps which delineated the areas acquired or inherited through NCR. Dispute arose when the plaintiffs discovered that
G the second and third defendants had alienated parcels of the land and issued a provisional lease. The perimeter of these parcels of land overlapped with or was similar to the perimeter of the NCR lands claimed by the plaintiffs. The plaintiffs alleged that the second and third defendants' action in alienating the lands to the
H first defendant was unlawful, null and void as (i) there was no extinguishment of the plaintiffs' NCR in accordance with the provisions of any existing law prior to the alienations of the lands and the issuance of the provisional leases to the first defendant;
I and (ii) they had the legal expectations that the lands would be given to them under s. 18 of the Sarawak Land Code. In his evidence, the first plaintiff ('PW1') claimed that their ancestors, who originated from Sungai Kedayan, Brunei, had migrated and

settled on the lands in 1909. However, in 1920, a mysterious illness or epidemic swept the land, forcing them to leave for other villages. PW1 testified that their ancestors continued to farm paddy and fruit trees on the NCR lands which they had cleared. PW1 further testified that the 153 plaintiffs had identified the individual plots of land inherited from their ancestors. Therefore, the plaintiffs, *inter alia*, sought the following declarations: (i) that they had acquired NCR over their plots of land; and (ii) that the acts of the second and third defendants in issuing the provisional leases to the first defendant, in so far as they affected the plots of lands claimed by the plaintiffs, were unlawful, null and void. The plaintiffs prayed for an order that the second defendant issue to each of the plaintiffs an individual title of their individual plots of land.

Held (dismissing plaintiffs' suits with costs):

(1) Little weight should be given to the two maps. The maps were prepared based on the plaintiffs' account regarding the locality and size of their individual plot of land. PW4, who prepared the map, had no personal knowledge of each of the plaintiffs' NCR claims. The maps did not provide any bearings and/or reference points and were not drawn to scale. In fact, the two maps were only sketch plans of the plots of land and were not proper maps or survey plans. Furthermore, evidence showed that the maps did not exist on 3 May 1999. PW1 used the date as it was the date stated in the forms and used by the other claimants. Based on evidence, the maps were likely to be ready only in 2002. (paras 31 & 33)

(2) None of the plaintiffs were born in 1909, 1910, the 1920's or 1930's when their ancestors had purportedly cleared and settled on the lands. Their evidence or accounts of their respective NCR claims were based on what they heard or what they were told or from family oral history. None of them had exhibited their birth certificate showing the names of their parents and their places of birth. These would have substantiated their claims that they were born at their village or at the NCR lands. (para 36)

(3) The plaintiffs relied on, *inter alia*, an article regarding the history of their ancestors' migration and settlement from Brunei to the land in dispute. However, the article did not refer to any mysterious illness or epidemic which caused them to move. If the mysterious illness or epidemic was the cause of the migration, the article would have highlighted it since it was based on interviews with the inhabitants of Kg Selanyau which purportedly included some of the plaintiffs. (paras 41 & 43)

(4) In 1966, parts of the lands claimed by the plaintiffs were issued with a timber licence by the Forests Department to the first defendant. Since then, the first defendant had entered into the licensed areas to legally harvest timbers pursuant to the timber licence. The licence was renewed annually until 31 July 2005. Another timber licence was issued to one Yak Lee Timber Company Ltd. If two timber licences were issued in respect of the areas claimed by them as their NCR lands and were being logged for timbers since 1966 and without any protest by the plaintiffs, these raised serious doubts on their evidence that the lands were settled by their ancestors and planted with paddy and fruit trees. There would be little or no merchantable timbers to be extracted if the lands had been cleared and planted with paddy and fruit trees. (para 45)

(5) The aerial photographs taken in 1947 and 1951 for the Sarawak Government showed that the areas claimed by the plaintiffs were then virgin jungles. These contradicted the plaintiffs' claims that their ancestors had in 1909-1910 cleared the virgin jungles, planted paddy and fruit trees and had settled on the lands since then. There was no evidence that the jungles or forests had grown back from 1909-1947 or 1951 so that they looked like virgin jungles from the air when the aerial photographs were taken. If their ancestors had been tending to their farms as alleged, they could not have become jungles or forests again. The farms or NCR land had to be abandoned for a long period of time for the jungles or forests to grow again. These raised serious doubts on the plaintiffs' evidence regarding their NCR claims. Furthermore, there was no evidence that any of the plaintiffs and/or their ancestors had cleared the 125 hectares or two hectares respectively. Hence, the plaintiffs had failed to prove their NCR claims on the balance of probabilities. (paras 46 & 53)

Case(s) referred to:

Agi Bungkong & Ors v. Ladang Sawit Bintulu Sdn Bhd & Ors [2010] 1 LNS 114 HC ***(refd)***

Ara Aman & Ors v. Superintendant of Lands and Mines, 2nd Div [1973] 1 LNS 5 HC ***(refd)***

Racha Urud @ Peter Racha Urud & Ors v. Ravenscourt Sdn Bhd & Ors [2012] 1 LNS 92 HC ***(refd)***

Sop Plantations (Suai) Sdn Bhd v. Ading Layang & 5 Ors [2004] 1 LNS 331 HC ***(refd)***

Superintendent of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors and Another Appeal [2005] 3 CLJ 555 CA ***(refd)***

Tapah Bangkol v. Supt of Lands and Surveys [1999] 1 LNS 86 HC ***(refd)***

TR Nyutan Ak Jami & Ors v. Lembaga Pembangunan Dan Lindungan Tanah & Ors, (High Court Suit No: 22-249-1998) (Unreported) ***(refd)***

Legislation referred to:

Federal Constitution, art. 5(1)

Land Code (Sarawak), ss. 2, 5(1), (2), 10, 18, 28, 84

For the plaintiffs - Baru Bian; M/s Baru Bian & Co

For the 1st defendant - Victor Wong; M/s Victor Wong & Chiew

For the 2nd & 3rd defendants - Jospeh Chioh; SAG Chambers, Kuching

Reported by Najib Tamby

JUDGMENT

Stephen Chung JC:

[1] These two suits were directed to be jointly tried and were part-heard before the previous presiding High Court Judge. Parties have agreed for the joint-trial to be continued before me. The plaintiffs altogether called eight witnesses and the defendants' three witnesses for the joint-trial.

[2] In Suit No: 22-16-2003, the plaintiffs testified that they are Kedayans by race and are natives of Sarawak. The three plaintiffs sued on behalf of themselves and 150 others and they claimed that they were the occupiers, owners and or claimants of native customary rights (NCR) over individual plots of land claimed and or owned by them situated at Sibuti.

[3] The plaintiffs asserted that at all material times they have acquired and or inherited NCR over all those areas of land delineated in a map and therein shaded in orange. The map is

marked "A" and attached to the statement of claim (exh. P1(A)). The individual plots with the acreage delineated in the map have been identified and agreed by the plaintiffs among themselves to belong to the individual plaintiff whose name is stated within each plot as shown in the map. The areas claimed by the plaintiffs in this suit as shown in the map added to approximately 2915.78 acres.

[4] In Suit No: 22-19-2003, the plaintiffs testified that they are all natives of Sarawak, are locally referred to as "Jati Mirik" and professed the religion Islam. They considered themselves to be Malays by race.

[5] In Suit No: 22-19-2003, the three plaintiffs sued on behalf of themselves and 90 others and they claimed that they were the occupiers, owners and or claimants of NCR over the individual plots of land claimed and or owned by them situated at Kampung Bakam.

[6] The plaintiffs also claimed that at all material times they have acquired and or inherited NCR over all those areas of land delineated in a map and shaded in orange in a map which is also marked "A" and attached to the statement of claim (exh. P8). The individual plots with the acreage delineated in the map have been identified and agreed by the plaintiffs among themselves to belong to the individual plaintiff whose name is stated within each plot as shown in the map. The areas claimed by the plaintiffs in this suit as shown in the map added to approximately 2,480 acres.

[7] The evidence showed that on 14 April 1997, the second and the third defendants had alienated a parcel of land and issued a provisional lease to this parcel land which is described as Lot 3927 Lambir Land District containing an area of 1,004 hectares to the first defendant. The perimeter of this parcel of land overlaps with or is similar to the perimeter of the NCR lands of the plaintiffs claimed by them in Suit 22-19-2003.

[8] The evidence showed that on 6 February 2001, the second and third defendants alienated another parcel of land and issued a provisional lease to the land which is described as Lot 3935 Lambir Land Districts containing an area of 1,180 hectares to the

first defendant. The perimeter of this parcel of land overlaps with or is similar to the perimeter of the NCR lands of the plaintiffs claimed by the plaintiffs in Suit 22-16-2003.

[9] In both suits the plaintiffs claimed that the second and third defendants' actions in alienating the lands to the first defendant which areas included the plaintiffs' NCR lands were unlawful, null and void. The plaintiffs said that there was no extinguishment of their NCR in accordance with the provisions of any existing laws prior to the alienations of the lands and the issuance of the provisional leases to the first defendant. The plaintiffs claimed that their NCR over the lands still subsist and that the actions of the second and third defendants were unconstitutional being in violation of art. 5(1) of the Federal Constitution.

[10] The plaintiffs claimed that they have legitimate expectations that their rights, traditions, cultures and livelihoods would not be disrupted, extinguished or be restricted by the issue of the provisional leases to the first defendant. The plaintiffs also claimed that they have the legal expectations that the lands which they claimed under NCR would be given to them under s. 18 of the Sarawak Land Code instead of being given to the first defendant.

[11] The plaintiffs in each of the two suits *inter alia* sought a declaration that the plaintiffs have acquired NCR over their plots of land, that the same still subsist and a declaration that the acts of the second and third defendants in issuing the provisional leases to the first defendant, in so far as they affected the plots of lands claimed by the plaintiffs, were unlawful, null and void. The plaintiffs prayed for an order that the second defendant do forthwith issue to each of the plaintiffs an individual title in respect of their individual plot of land as identified in the map annexed to each statement of claim.

[12] The defendants denied the plaintiffs' allegations and submitted that the plaintiffs have not acquired and did not have any NCR over the areas shaded in orange in the map attached to the respective statement of claim or any part thereof. It was submitted that the plaintiffs have not in any way properly and sufficiently identified the individual plot of land claimed by each of them.

[13] The defendants submitted that the second and third defendants acted properly and legally in issuing the two provisional leases to the first defendant. It was submitted that prior to the grant and issuance of the provisional leases to the first defendant, the relevant government departments did investigate and check all claims and or entitlements to the lands to be alienated to the first defendant but did not have any notice of any claims by the plaintiffs or any of the plaintiffs and or have not found any such claims to be valid, proper or substantiated in law or in fact.

[14] Although the defendants have put the plaintiffs to strict proof thereof, the defendants have not led any evidence to establish that the plaintiffs are not Kedayans or Jati Mirik or natives of Sarawak. Under native customs in Sarawak, a native of Sarawak can create and acquire NCR over land by clearing virgin jungle and farming the land which has been cleared or inheriting the native customary lands from their ancestors. These customs have been recognised and codified in legislations in Sarawak. Section 2 of the Sarawak Land Code defines Native Customary Land to include land in which native customary rights, whether communal or otherwise, have lawfully been created prior to the first day of January, 1958, and still subsist as such. Pursuant to s. 5(1), as from first January, 1958, NCR may be created in accordance with the native customary law of the community concerned by any of the methods specified in sub-s. (2), if a permit is obtained under s. 10.

[15] The burden is on the plaintiffs to prove the acquisition of NCR in accordance with the laws of Sarawak in respect of the lands claimed by them. It must be proven by cogent evidence and not by bare assertions (see *Ara Aman & Ors v. Superintendant of Lands and Mines, 2nd Div* [1973] 1 LNS 5; [1979] 1 MLJ 208, *Tapah Bangkol v. Supt of Lands and Surveys* [1999] 1 LNS 86; [1999] 3 MLJ 588, *Sop Plantations (Suai) Sdn Bhd v. Ading Layang & 5 Ors* [2004] 1 LNS 331; [2004] 4 MLJ 180.

[16] The first plaintiff Abu Bakar Pangis (PW1) is a community leader of the Kedayans. He was born in 1940, appointed a Penghulu of the Kedayan community in Sibuti in 1978 and became a Pemanca in 1994. He said that the 153 plaintiffs in Suit 22-16-2003, including himself, lived in 13 different villages ie, Kampung Satap (10km), Kampung Selanyau (5km), Kampung Kawang (10km), Kampung Danau (8km), Kampung Opak (4km),

Kampung Kejapil (12km), Kampung Batu Satu Beraya (2km), Kampung Keluru Tengah (12km), Kampung Terhad (7km), Kampung Bungai (20km), Kampung Angus, Kampung Peluang Kelulit and Kampung Nyalau. The distance in bracket indicates the distance of each village from the claimed NCR lands. Both Kpg Peluang Kelulit and Kpg Nyalau are very far from the NCR lands. None of the 13 villages are situated within their claimed NCR lands or Lot 3935.

[17] He said that their ancestors originated from Sungai Kedayan in Brunei, migrated and settled on the lands situated near to Kampung Selanyau in 1909 ie, on the different plots of land as shown in the map marked 'M' (exh. P1(A) and P1(B)). He said the date 1909 was a date which they found inscribed on a tomb stone located within their NCR lands.

[18] PW1 said that in the year 1920, a mysterious illness or epidemic affected their ancestors, forcing them to leave the lands settled by them and to move to Kampung Satap, Kampung Uban, Kampung Opak, Kampung Danau, Kampung Kelulit and Kampung Nyalau and other kampongs. PW1 said that their ancestors however continued to farm the NCR lands which they had cleared. He testified that the lands as shown in the map are located within the perimeter of Kampung Opak, Kampung Batu Satu Beraya and Kampung Selanyau. He said there are two graveyards used by their ancestors and themselves, one situated at Sg. Jalid and the other at Sungai Payau.

[19] He said that the 153 plaintiffs inherited the lands from their ancestors which were planted with fruit trees. PW1 said that they had several meetings regarding their NCR claims and that each of the plaintiffs had identified their individual plot of land which they had inherited from their ancestors and he had spoken to each plaintiff to verify their claim. PW1 said that each of the plaintiffs had signed their respective "Surat Pengesahan dan Pengakuan" in his presence (exh. P2). They then instructed Encik Dahlan bin Haji Gani (PW4) to survey their NCR lands based on the forms. Subsequently each of the plaintiffs had identified their individual plot of land to PW4 who then prepared the map 'M' (exh. P1(A)) which set out the locality and acreage of each plot of land. He together with Penghulu Salim bin Hj Ebrahim (PW2) signed on exh. P1(A) to confirm the plaintiffs' claims to the NCR lands.

[20] PW1 said that he gathered all the information of the plaintiffs' claims to their respective individual plot of land and wrote a letter dated 10 August 2001 (exh. P3) to the Superintendent of the Lands and Surveys, Miri Division ie, the second defendant. There was no reply to this letter.

[21] PW1 said that they then heard rumours in 2001 that the different parcels of land which they had farmed had been alienated and a provisional lease issued to the first defendant. He together with PW2 and PW3 (Sapar bin Ismail) went to the Lands and Surveys, Miri to make an enquiry and they found out that their lands had indeed been given to the first defendant as Lot 3935 Lambir Land District.

[22] He said that they were never consulted or told of the alienation. They also did not know of any gazette notification affecting their lands. PW1 said that until now no compensation was paid to them for taking away their lands. He said that they expected the second and third defendants to issue the land titles to them instead of to the first defendant as they were the rightful owners or claimants to the said lands. He said that the alienation of the lands to the first defendant by the second and third defendants had affected their rights, traditions and cultures and disrupted their livelihoods.

[23] PW2 is also a community leader of the Kedayans at Sibuti. He was appointed a Penghulu in December, 1999. His evidence as contained in his witness statement was similar to that of and corroborated the evidence of PW1 on the plaintiffs' claims to their NCR lands.

[24] In Suit 22-19-2003, Karim bin Enur (PW5) was appointed a Penghulu of their community by the Resident of Miri division in 1992. He testified that their ancestors originally settled in Baram and migrated to their present village in Bakam in 1910 under his grandfather who died at the village in the 1930's. He said his grandfather was awarded the 'Orang Kaya' title by the then Sultan of Brunei and was also honoured by the Sarawak Government under Raja Vyner Brooke with a 'Long Service Decoration' medal.

[25] He said that their NCR lands are within the compound of their village and the farthest plot of land is within 30 minutes walk from their village. They visited and farmed their lands daily which had been cultivated and occupied by their ancestors and inherited by them. He said their lands are planted with fruit trees.

[26] PW5 said each of the plaintiffs in this suit filled in and signed a form to confirm their claims and he verified their claims as their penghulu by signing on the forms. He testified that he and the other plaintiffs appointed PW4 to survey their lands which was carried out from 1996 to 1997. The survey was carried out with the assistance of all the plaintiffs who identified the locality and size of their individual plot of land to PW4 during the survey. The forms were tendered as exh. P7 and the map prepared by PW4 in respect of the survey of their lands was tendered as exh. P8. The total areas claimed by them amounted to 2480 acres.

[27] He said that in 2001 they heard rumours that their lands had been alienated to the first defendant and a provisional lease had been issued in respect thereof. He said that he together with Madani bin Wahat (PW6) and Asin bin Bujang went to the office of the second defendant to inquire and found that their lands had been alienated to the first defendant without their knowledge. He said that they were never consulted nor given any compensation when their lands were taken away and given to the first defendant. He said that the land should have been alienated to them with the title thereto because their ancestors had cleared and farmed the lands since 1910 and they had inherited the lands.

[28] He said that some of them had in fact been issued with documents of title in respect of other parcels of land in the vicinity. He said that he was previously issued with a title for a parcel of native land described as Lot 713 Block 14 Lambir Land District with an area of 1.93500 hectares and that he had sold the land. He said that this fact established that the area claimed by them were native customary land. PW6 gave evidence which was similar to that of PW5.

[29] In these two suits, it is not in dispute that the plaintiffs did not personally clear the virgin jungles and create or acquire the NCR over the lands from their own efforts. They claimed that their ancestors had settled in the respective areas and had cleared

and farmed the lands in 1909 and 1910 respectively ie, prior to first January, 1958. They claimed that they have inherited the NCR lands from their forefathers and that the NCR still subsist.

[30] Have the plaintiffs proved their NCR claims to the lands on a balance of probabilities? I am aware of the evidentiary difficulties faced by the natives, in this case the plaintiffs, in proving their NCR which originate in times of limited record keeping and that the court ought to take a realistic and sympathetic approach when applying the rules of evidence (see *Agi Bungkong & Ors v. Ladang Sawit Bintulu Sdn Bhd & Ors* [2010] 1 LNS 114 and *TR Nyutan Ak Jami & Ors v. Lembaga Pembangunan Dan Lindungan Tanah & Ors*, Kuching High Court Suit No: 22-249-1998. I am also aware of the comments made by the Court of Appeal in *Superintendent of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors and Another Appeal* [2005] 3 CLJ 555 that the self-serving testimonies of some of the witness should carry little or no weight in the absence of some other credible corroborative evidence. In other words, what they have said during the trial must be tested against the evidence of the other witnesses, the undisputed facts in the case and the documentary exhibits referred to during the trial.

[31] From the evidence, each of the plaintiffs in these two suits had filled in and signed a 'Surat Pengesahan dan Pengakuan' to claim their individual plot of land and each plot or parcel was referred to as a field lot, for example F/L125. PW1 had on 6 May 1999 signed on these forms and had on 3 May 1999 signed the map P1(A) as their penghulu whereas PW2 had on 28 March 2002 signed on the forms and on 21 July 2000 signed on P1(A) as their penghulu to verify their claims. PW5 signed on the forms (P7) in 1999 and on the map (P8) on 3 July 2002 as their penghulu to verify their claims. The evidence showed that the map P1(A) did not exist on 3 May 1999. PW1 used the date because it was the date stated in the forms and used by the other claimants. Based on the dates used by PW2 and PW5, the maps were likely to be ready only in 2002. They said that they verified the claims to the individual plot of land based on what the other plaintiffs had told them. From the evidence, it was obvious that they had no personal knowledge of each and every claim made by the other plaintiffs. For example, PW1 did not know how many of the plaintiffs lived in Kpg Satap or in Kpg Selanyau or Kpg Kawang or in the other villages or when were some of the villages established.

[32] PW4 prepared the two maps respectively marked as 'M' (exh. P1(A), P1(B) and P8). He said that in 1996 the plaintiffs in Suit 22-19-2003 requested him to survey their NCR lands at Kampung Bakam which was completed in 1996 to 1997. He said that in 1998 the plaintiffs in Suit 22-16-2003 requested him to survey their NCR lands near to Kpg. Opak, Kpg. Batu Satu Beraya and Kpg. Selanyau.

[33] He said that in each case he made a few trips to the lands to do his survey works with the assistance of each plaintiff and their family members who pointed out the boundary and the size of their individual plot of land to him. Upon completion of his field works, he transferred and charted his field notes and data onto a topography map which he photocopied from the office of the Lands & Surveys Department, Miri. The two topography maps were the two maps marked as 'M'. The maps were prepared by him based on what the plaintiffs had told him regarding the locality and size of their individual plot of land. He had no personal knowledge of each of the plaintiffs' NCR claims. The maps did not provide any bearings and or reference points and were not drawn to scale. The maps did not show the locality of or the distance of the claimed NCR lands from Kpg. Opak, Kpg. Batu Satu Beraya, Kpg. Selanyau or Kpg. Bakam or Sg. Jalid or Sg. Payau. PW4 in his evidence agreed that the two maps prepared by him were only sketch plans of the plots of land and were not proper maps or survey plans. Therefore, little weight should be given to the two maps prepared by PW4 for and on behalf of the plaintiffs in these two suits.

[34] Looking at the forms (exh. P7), the plaintiffs in Suit 22-19-2003 filled in and signed their forms to claim their individual plot of land in 1999, after PW4 said he had completed his survey in 1996-1997. Similarly, the plaintiffs in Suit 22-16-2003 filled in and signed their claim forms (P2) in 1999 after PW4 had completed the survey.

[35] The evidence showed that PW1 claimed F/L125 which contained 18.30 acres for himself. The evidence showed that he was asked to point to his plot of land on the map (exh. P1(B)) but he was unable to do so even after 15 minutes. He was asked and he did not know the date of birth of his father though he knew that his father passed away in April 1972. Similarly, the

A evidence showed that PW4 took about 30 minutes to answer a question and eventually said that he did not want to answer the question (see pp. 134-135 NOP).

[36] None of the plaintiffs in either suit had been born yet in
B 1909 or 1910 or the 1920's or 1930's when their ancestors had purportedly cleared and settled on the lands. PW1 was born in 1940, PW2 in 1949 and PW5 in 1943. Their evidence or accounts of their respective NCR claims were based on what they heard or what they were told or from family oral history. None of
C them had exhibited their birth certificate which would have shown the name of their parents and their place of birth. These would have substantiated their claims that they were born at their village or at the claimed NCR lands.

[37] PW1 testified on the tomb stone which was dated 1909 and
D he said this piece of evidence was never challenged by the defendants. However, he never produced any photograph of this tomb stone which was dated 1909 or any proof to substantiate what he said. PW7 took the photographs which were referred to during the trial and testified that there was a tomb stone dated
E 1824 but PW7 also did not refer to any specific photographs to show the tomb stone with the date '1909' on it or the tomb stone with the date '1824' on it. The photographs were not tendered as exh. PW2 in his cross-examination said that he did not know how old were the graves found on their NCR lands.
F The maps prepared by PW4 did not refer to any graves within the claimed NCR lands.

[38] PW5 said that his father was awarded the Orang Kaya title by the then Sultan of Brunei and awarded the Long Service
G Medal by Raja Vyner Brooke but he did not exhibit any certificate, medal or photograph to substantiate his claims. PW5 also said the areas claimed by them were native customary land and that some of them had been issued a document of title for other parcels of NCR land which belonged to them. PW1 said that he was
H previously issued a document of title to a parcel of NCR land described as Lot 713 Block 14 Lambir Land District and that he had sold this parcel of land. However, he did not exhibit a copy of the document of title or the sale and purchase agreement or memorandum of transfer to substantiate what he had said.

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[39] The plaintiffs had referred to certain documents which were marked for identification as ID6 and ID9. These documents were not tendered as exhibits. Notwithstanding that, ID6A showed that it was a verification of land boundary of a parcel of land described as F/L45 claimed by Sapar bin Ismail. ID9A showed that the documents were in respect of a case '*Mustapha bin Ujan (40 orang) v. Nawang bin Malik (13 orang)*' in the Native Court.

[40] In Suit 22-16-2003, Sapar bin Ismail claimed F/L33 as his NCR land and not F/L45 which was claimed by Alim bin Ahim. In Suit 22-19-2003, F/L45 was claimed by Sini b. Tagap as his NCR land and not by Sapar bin Ismail. Therefore, the documents in respect of F/L45, ID6 and ID9 did not relate to the same plot of land claimed by the plaintiffs in these suits and did not substantiate the testimony of the plaintiffs' witnesses that the areas claimed by them were native customary land.

[41] Learned counsel for the plaintiffs also referred to an article *"Kampung Selanyau: Social and Economic Organizations of a Kedayan Ricegrowing village in Sarawak"* written by Clifford A. Sather and Hatta Solhee and published in the Sarawak Museum Journal Special Issue vol. XXII in support of the evidence of PW1 and PW2 regarding the history of the settlement of the plaintiffs' ancestors at Sibuti in general and at Kpg Selanyau in particular. This article was based on a field study carried out by the authors who had prepared an earlier project report in 1973. This article gave a brief history of the migration of the Kedayan from Brunei to Sibuti and the settlement at Kpg Selanyau.

[42] It stated that the village was founded in the late 1920's and early 30's by families from Kpg Bungei, an early Kedayan settlement in the Sibuti area and from Kpg Gadong in Brunei. It stated that the settlers were attracted to Selanyau by its rich padi land. These, contrary to the submissions of the plaintiffs' counsel, did not support what PW1 had said that the plaintiffs' ancestors originally migrated from Sungai Kedayan in Brunei.

[43] The article also did not refer to any mysterious illness or epidemic which caused the Kedayans in the Sibuti area to move to Kpg Selanyau and the other villages. If the mysterious illness or epidemic was the cause of the migration to Kpg Selanyau and the other villages, the article would have made reference to it since

it was based on interviews with the inhabitants of Kpg Selanyau which purportedly included some of the plaintiffs in Suit 22-16-2003.

[44] The evidence showed that parts of the lands claimed by the plaintiffs in Suit 22-16-2003 were in 1966 issued with a timber licence T/0029 (exh. D16) by the Forests Department to the first defendant. Since then the first defendant had entered into the licensed areas to legally harvest timbers pursuant to the timber licence. The licence was renewed annually until 31 July 2005. Another timber licence T/0030 was issued to Yak Lee Timber Company Ltd, also in 1966, and this was confirmed by PW1 during his cross-examination. PW1 said that he had worked for this timber company for many years.

[45] If two timber licences were issued in respect of the areas claimed by them as their NCR lands and were being logged for timbers since 1966 and without any protest by the plaintiffs, these raised serious doubts on their evidence that the lands were settled by their ancestors and planted with padi and fruit trees. There would be little or no merchantable timbers to be extracted if the lands had been cleared and planted with padi and fruit trees. Further, why did PW1 and the other plaintiffs not protest or take actions against the licences or the timber companies at the material times since the logging would have affected and or impaired their NCR lands. Why did they not claim or submit their claim to their NCR lands to the Lands & Surveys earlier but waited until 2001, after the two parcels of land had been alienated to the first defendant?

[46] The aerial photographs taken in 1947 and 1951 for the Sarawak Government showed that the areas claimed by the plaintiffs in both suits were then virgin jungles. These contradicted their claims that their ancestors had in 1909 and 1910 cleared the virgin jungles, planted padi and fruit trees and had settled on the lands since then. The plaintiffs submitted that the jungles or forests had grown back from 1909 to 1947 or 1951 so that they again looked like virgin jungles from the air when the aerial photographs were taken. There was no such evidence. If their ancestors had been tending to their farms as alleged, how could they become jungles or forests again. The farms or NCR land had to be

abandoned for a long period for the jungles or forests to grow again. These again raised serious doubts on the plaintiffs' evidence regarding their NCR claims.

[47] DW1 (Abdul Razak bin Morshidi) was the land officer with the Lands & Surveys Department, Miri Division from 15 November 2004 until 30 June 2009. He testified that the standard procedure and practice of the Lands & Surveys Department, Sarawak, before a provisional lease was issued, was that the department would determine the status of the land applied for. This would be based on the official records, namely the cadastral plan, aerial photographs, land use maps derived from the aerial photographs and other official records of other departments such as the forests department of Sarawak.

[48] He said that the boundary of a land proposed to be alienated and to be issued with a provisional lease would be adjusted to exclude areas which might have encumbrances or already held under land titles. He said that in other words, based on the aerial photographs and the land use map, the boundary of the land under a provisional lease would exclude all cleared, cultivated or farmed areas because they were likely to have native customary rights or claims and were regarded as encumbrances. The land recommended to be issued with a provisional lease would be free from any encumbrances. DW1 said that once the area which was free from encumbrances was marked out, the plan showing the area and the terms and conditions of the provisional lease would be forwarded to the departmental headquarters for approval.

[49] DW1 testified that the provisional lease for Lot 3927 Lambir Land District containing an area of 1,004 hectares was issued on 14 April 1997. It was declared as Mixed Zone Land *vide* the Lambir Land District (Mixed Zone Land) Declaration Order, 1996 *vide* Gazette Notification No. Swk LN 30 published on 20 June 1996. The provisional lease was issued to the first defendant.

[50] He testified that the provisional lease for Lot 3935 Lambir Land District containing an area of 1,180 hectares was issued on 6 February 2001. The land classification for Lot 3935 Lambir Land District is Mixed Zone Land which was published in Gazette Notification No. Swk LN 71 as the Miri Division (Mixed Zone

Land) (No. 2) Declaration Order, 1999 which was published in the Gazette on 14 October 1999. He said that the provisional lease was also issued to the first defendant. He said that these provisional leases were issued pursuant to s. 28 of the Land Code.

[51] DW3 (Saiful Izam bin Kassim) is a staff surveyor and cartographer with the Lands & Surveys Department Headquarters, Sarawak. His responsibilities or duties included being head of the aerial photo interpretation unit (APIU) and cartography section. He was instructed to prepare a plan on the interpretation of aerial photographs over the areas claimed by the plaintiffs in Suit 22-16-2003(MR) and 22-19-2003(MR). He was shown a sketch plan of each of the areas claimed by the plaintiffs in both suits.

[52] He said that from his investigation and based on the pattern, shape, size, tone and texture contained in the aerial photographs which were taken in 1947 and 1951, there were approximately 125 hectares within the boundary of Lot 3935 which were cleared areas whereas there were approximately 1,056 hectares of primary or virgin jungles. These gave a total of approximately 1,181 hectares for Lot 3935. He said that for Lot 3927, there were approximately 2 hectares of land which were cleared areas whereas there were approximately 1,002 hectares of primary jungles. These gave a total of approximately 1,004 hectares for Lot 3927. These cleared areas would be excluded from Lot 3935 and 3927 when the perimeter surveys are carried out pursuant to s. 28 of the Land Code.

[53] This evidence contrasted with the plaintiffs' evidence that their ancestors had cleared 1,181 hectares and 1,004 hectares of virgin jungles and had planted padi and fruit trees on the two parcels of land. There is no evidence before the court that any of the plaintiffs and or their ancestors had cleared the 125 hectares or 2 hectares respectively. From the evidence before the court, the plaintiffs, in each suit, have failed to prove their NCR claims on the balance of probabilities.

[54] The second and third defendants have also submitted that the plaintiffs have not complied with the Government Proceedings Act, that the maps prepared by PW4 were not prepared in accordance with the Sarawak Land Surveyors Ordinance 2011, that it was not proper for the plaintiffs to challenge the issuance

of the timber licences and or the provisional leases by way of this action and that this court has no original jurisdiction to grant the reliefs sought by the plaintiffs. These issues were however not pleaded in the defence of the second and third defendants.

[55] The first defendant and the second to third defendants had, towards the end of the trial, each filed an application that the plaintiffs' challenge should be by way of a judicial review and I had dismissed the applications as being too late in the day as the trial was near completion at that point in time.

[56] I have in other similar or NCR cases ruled that s. 84 of the Land Code does not oust the jurisdiction of the court to hear NCR disputes (see *Racha Urud @ Peter Racha Urud & Ors v. Ravenscourt Sdn Bhd & Ors* [2012] 1 LNS 92, MR-21-4-2011).

[57] For the reasons given, the plaintiffs' suits are dismissed with costs to be taxed.